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No. 87-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner,

v.

BEATRICE COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Does this Court have jurisdiction to review by writ of certiorari a judgment of the Delaware Supreme Court holding that petitioner lacked standing under Delaware state law to object to the settlement of state shareholder derivative litigation, having purchased his shares after the transaction at issue in the settled litigation?

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* The text of these provisions is reproduced in full at Appendix A hereto.

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Petitioner,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents[1] respectfully submit that the petition of William Leighton for a writ of certiorari should be denied.

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1 Respondents' Supreme Court Rule 28.1 Statement appears at Appendix B hereto. Respondents are defendants below, Beatrice Companies, Inc., various of its directors at the time of the acquisition challenged in the litigation, William W. Granger, Jr., Frank E. Grzelecki, David E. Lipson, Anthony Luiso, William S. Mowry, Richard J. Pigott, Angelo R. Arena, Bernard A. Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Costanzo, Walter J. Leonard, Goff Smith, James W. Cozad, Cedric E. Ritchie, William G. Karnes, Jayne B. Spain and Russell Wagner, Kohlberg Kravis Roberts & Co. ("KKR"), Joel E. Smilow, a member of the KKR investor group, and, although petitioner does not include them in the list of parties in his petition, plaintiffs below, Bertha Watkins, Ernest Brooks, III, Harold Sachs, Irving S. Hook, Stuart D. Wechsler, United Operating Company, Leonard Barkan, Sam Wietschner, Bernard Lowe, Ruth Rosenbluth, Peter Nemphos and Louis Nemphos, as joint tenants, Harry Lewis, The Martha & Regina Brand Foundation, Inc., Jean C. Osajda, SCB Co., Josephine Freeman, Robert A. Weiss, Louis Klein, Gary Slavik, Allan L. Kovacs and Gertrude Flacks, and defendant below James L. Dutt, a former officer of Beatrice Companies, Inc.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3) (1982). For the reasons discussed below, respondents respectfully submit that this Court is without jurisdiction to issue a writ of certiorari to review the decision of the Delaware Supreme Court.

COUNTERSTATEMENT OF THE CASE

The petition herein arises out of the settlement of a series of consolidated derivative and class actions in Delaware state court challenging the acquisition of respondent Beatrice Companies, Inc. ("Beatrice") through a merger organized by respondent Kohlberg Kravis Roberts & Co. ("KKR"). Following notice to Beatrice's stockholders and class members and a hearing, the settlement of those actions was approved as fair and reasonable by the Delaware Chancery Court over petitioner's objections. On appeal, the Delaware Supreme Court concluded that petitioner had no standing to object to the settlement because he was not a Beatrice stockholder at the time of the events at issue in the litigation and affirmed the Chancery Court's approval of the settlement. Petitioner seeks review by this Court of the Delaware Supreme Court's decision despite the fact that no federal question was decided because petitioner lacked standing to raise any objection to the settlement.

Background of the Litigation

KKR first proposed an acquisition of Beatrice by means of a merger on October 16, 1985. The Beatrice Board of Directors later voted to accept a revised KKR offer, and on November 14, 1985, Beatrice entered into an acquisition agreement (the "Initial Merger Agreement") with BCI Holdings Corporation ("BCI"), a corporation newly created by KKR, and BCI's subsidiary, BCI Merger Corporation ("BCI Merger"). Litigation began immediately after announcement of the Beatrice

Board's acceptance of KKR's offer. Commencing November 15, 1985, nine derivative and class actions were filed in the Delaware Chancery Court. The suits were consolidated under the caption *In re Beatrice Companies, Inc. Litigation* (the "Consolidated Action"). The Consolidated Action made various allegations arising under state law. Seven suits filed in the Circuit Court of Cook County, Illinois (the "Illinois Actions") contained allegations arising under state law similar to those raised in the Consolidated Action.

In late January 1986, following extended expedited discovery, attorneys for plaintiffs in the Consolidated Action and Illinois Actions engaged in discussions with representatives of Beatrice and KKR. These negotiations culminated in a Memorandum of Understanding dated February 1, 1986, which eliminated the features of the Initial Merger Agreement that plaintiffs found objectionable, improved the consideration that Beatrice stockholders would receive for their shares in the merger, and provided for the settlement of plaintiffs' claims, subject to additional discovery and court approval.[2] After concluding that it was in the best interest of Beatrice and its stockholders, the Board of Directors, the majority of which were disinterested outside directors, approved the proposed settlement set forth in the Memorandum of Understanding and Beatrice, BCI and BCI Merger entered into a Revised Merger Agreement in accordance therewith.

Approval of the Settlement as Fair and Reasonable

Following the completion of discovery, the parties entered into a stipulation of settlement in accordance with the terms of the Memorandum of Understanding, and applied to the Delaware Chancery Court for approval of the proposed settlement. On March 11, 1986, the Delaware Chancery Court, for purposes of settlement, issued an order directing that the Consoli-

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2 Plaintiffs in the Consolidated Action and Illinois Actions subsequently filed an amended complaint in Delaware which contained all of the allegations raised in those actions and the Illinois Actions were discontinued.

dated Action be maintained as a derivative and class action and conditionally certifying a class consisting of all holders of Beatrice stock (other than defendants) at the close of business on February 20, 1986 (the record date for the stockholder vote on the merger), and their successors in interest and transferees.

The Chancery Court also ordered a hearing on the issue of whether the settlement, taken as a whole, was fair and adequate to Beatrice, its stockholders and the class members. The proxy statement issued in connection with the merger was sent to Beatrice's stockholders on March 11, 1986. Petitioner alleges that he purchased an undisclosed number of shares of Beatrice stock some time following March 11, with knowledge of the merger plan and the proposed settlement of the Consolidated Action, both of which were disclosed in the proxy materials. On April 11, 1986, the proposed merger was approved by 98% of those voting at the Beatrice stockholders' meeting and by 81% of Beatrice's outstanding shares.

By letter dated April 4, 1986, and filed with the Chancery Court, petitioner objected to the settlement on various state law grounds and also on the grounds that BCI was in violation of Section 7 of the Securities and Exchange Act of 1934 and Section 7(a) of the Investment Company Act of 1940.[3] Petitioner did not claim that he had standing to object to the settlement as a stockholder of Beatrice, but rather claimed that he was an "offeree" of BCI.

The Delaware Chancery Court conducted a full hearing on the proposed settlement on April 14, 1986. Petitioner did not appear at the hearing. The Chancery Court rendered its opinion on April 16, 1986. (A. 1a)[4] The Chancery Court reviewed in detail the provisions of the transaction and settlement and determined that "both Beatrice and the class on whose behalf these actions are prosecuted will receive real and substantial

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3 Beatrice, its directors and KKR filed a joint response to petitioner's letter, dated April 11, 1986, in which they denied any violation of the federal securities laws.

4 "A." refers to the Appendix to the petition.

benefits" from the settlement. (A. 18a) The Chancery Court concluded that the benefits provided to Beatrice and its stockholders constituted "fair and reasonable compensation for the dismissal of the claims asserted in the amended complaint." (A. 20a) In rendering its opinion, the Delaware Chancery Court specifically considered and rejected petitioner's contentions. (A. 25a-26a)

Petitioner's Challenges to the Delaware Chancery Court's Decision

Petitioner made a broad-based attack on the approval of the settlement in a letter to the Chancery Court dated April 21, 1986. In this letter petitioner claimed for the first time that he was a Beatrice stockholder, but admitted that he had not purchased his stock until after the record date for voting on the proposed merger. In a letter dated April 25, 1986, the Chancery Court informed petitioner that it had treated his letter as a motion for reargument and declined to modify its order in any respect. (A. 41a) Petitioner filed a motion in the Delaware Supreme Court to vacate the Chancery Court's April 16 order approving the settlement. The Delaware Supreme Court denied petitioner's application. (A. 42a)

Petitioner then appealed to the Delaware Supreme Court from the Chancery Court's decision and, in his brief, asserted that he was acting "derivatively on behalf of Beatrice and not representatively on behalf of certified class members," and reiterated his objections to the settlement based upon alleged violations of the federal securities laws.[5] The Delaware Supreme Court, in its decision dated February 20, 1987, dismissed all of petitioner's objections to the settlement, concluding that under Delaware law petitioner had no standing to challenge the merger in a derivative capacity. (A. 50a, 58a-61a) In addition, after a thorough review of the transaction

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5 In his petition to this Court petitioner continues to assert derivative standing only, relying upon Section 327 of the Delaware Corporation Law which governs standing to maintain derivative actions. Del. Code Ann. tit. 8, § 327 (1983).

and settlement, and of the Chancery Court's treatment thereof, the Delaware Supreme Court affirmed in all respects the Chancery Court's decision that the settlement was fair and reasonable. (A. 50a)

On March 9, 1987, petitioner moved the Delaware Supreme Court to reconsider its order of February 20, 1987. On March 24, 1987, the court denied petitioner's motion. (A. 67a)

Subsequent Proceedings

Petitioner has continued his efforts to overturn the settlement. On May 5, May 8 and May 20, 1987, petitioner requested that the Delaware Chancery Court reopen the case and vacate its April 16, 1986 order approving the settlement. On June 23, 1987, the Chancery Court denied petitioner's motions, holding that the arguments submitted by petitioner would not have changed the result had they been submitted at the settlement hearing and that, in any event, as the Delaware Supreme Court had found, petitioner had no standing to litigate any aspect of the matter. (A. 68a, 70a)

By letter dated June 26, 1987, petitioner requested reargument of the Chancery Court's decision of June 23, 1987, which request was denied on July 6, 1987. (A. 71a) On July 20, 1987, petitioner sought leave to supplement the record regarding the denial of his motion to reargue. On July 24, 1987, the Chancery Court denied that application. (A. 72a)

On July 22, 1987, petitioner noticed an appeal to the Delaware Supreme Court from the Chancery Court's decisions of June 23 and July 6, 1987, denying petitioner's motions to reopen the case. That appeal is still pending. Plaintiffs and defendants in the settled actions have moved in the Delaware Supreme Court to dismiss petitioner's appeal, affirm the judgment below and assess costs against petitioner for his protracted litigation of settled questions. Those motions are still pending.

REASONS FOR DENYING THE WRIT

The petition presents for review a state court decision that rests solely on Delaware corporation law. Petitioner has satisfied none of the jurisdictional requisites for issuance of a writ of certiorari.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT OF THE DELAWARE SUPREME COURT BECAUSE PETITIONER DID NOT SPECIALLY SET UP ANY FEDERAL CLAIM UNDER 28 U.S.C. § 1257(3) AND BECAUSE THE JUDGMENT BELOW RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

Petitioner invokes this Court's jurisdiction to review a decision of the Delaware Supreme Court declining to consider his state and federal law objections to the settlement of a derivative action, which decision was based on the fact that, under the law of Delaware, petitioner lacked standing to challenge the settlement. There is no jurisdictional basis for this Court to issue a writ of certiorari and review the Delaware judgment. The jurisdictional statute, 28 U.S.C. § 1257(3) (1982), limits this Court's review on certiorari to instances where a federal claim was properly raised in the state court. Petitioner's lack of standing to object to the settlement of the derivative action on any basis—state or federal—rendered his claims improperly raised. In addition, this Court lacks jurisdiction because the Delaware Supreme Court's decision rests on an independent and adequate state law ground—petitioner's lack of standing. Thus, the Delaware Supreme Court's decision is not subject to review on a writ of certiorari from this Court.

A. No Statutory Basis Exists for this Court to Exercise Jurisdiction Because Petitioner Did Not Properly Set Up A Right Under Federal Law in the Proceedings Below

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3). While the petition is far from clear, petitioner apparently asserts that he "specially set up" a right under federal law in the state court proceeding.[6] As noted above, federal claims were injected into the Delaware Consolidated Action only by petitioner's assertion that the existence of such potential claims constituted grounds for the state court to reject settlement of that action. The mere fact that federal questions were introduced at some stage in a state court action does not trigger this Court's jurisdiction to issue a writ of certiorari. A party must have *properly* asserted his federal claims. *See Webb v. Webb*, 451 U.S. 493, 499 (1981); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. 490, 493 (1919); *Atlantic Coast Line Railroad Co. v. Mims*, 242 U.S. 532, 535 (1917). *See also* R. Stern, E. Gressman & M. Shapiro, *Supreme Court Practice*, § 3.19 at 145 and n.40 (6th ed. 1986).

A state court's determination, as a threshold matter, that a litigant lacks standing under state law and, therefore, has not properly raised his claims, is a sufficient basis for declining to reach asserted federal claims.[7] *See Cramp v. Board of Public*

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6 While petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3) and apparently asserts that he "specially set up" federal claims below, he also asserts that it is not his objective to have this Court consider those claims. Rather, petitioner would have this Court grant certiorari solely for the purpose of remanding the case and directing the Delaware Supreme Court to rule on his objections to the settlement based upon alleged federal law violations of the defendants below. (Petition at 30, 33-34)

7 Petitioner suggests that under Delaware Supreme Court Rule 8, the Delaware Supreme Court was prohibited from reaching the standing issue because it was not raised in the Chancery Court. (Petition at 18-

(*Footnote continued on next page*)

Instruction, 368 U.S. 278, 281-82 (1961) (assuming that the Supreme Court would not review a state court decision that a litigant lacked standing in the state court to challenge a state statute on federal constitutional grounds). *Cf. Orr v. Orr*, 440 U.S. 268, 274 (1979); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting) (in deciding whether a question is "specially set up or claimed" under Section 1257(3), "it is relevant and usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of issues"); *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387 (1929); *John v. Paullin*, 231 U.S. 583, 585 (1913).[8]

Although this Court is not bound by a state court's determination that the federal question was improperly raised, *see*, *Street v. New York*, 394 U.S. 576, 583 (1969); *Parker v.*

(*Footnote continued from previous page*)

19) In the first instance, this Court has no jurisdiction to determine whether the Delaware Supreme Court erred in deciding an issue that arises solely under state law. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380 (1986). In any event, respondents raised the question of standing in an April 11, 1986 submission to the Chancery Court, and petitioner referenced the issue in his responsive letter to the Chancery Court dated April 14, 1986, which was well before his appeal to the Delaware Supreme Court. Moreover, Rule 8 expressly empowers the Delaware Supreme Court to consider and determine any question not presented to the trial court when the interests of justice so require. Petitioner's standing to raise derivative claims on behalf of Beatrice was first considered by the Delaware Supreme Court because it was not until after the Chancery Court's decision that petitioner claimed to have standing as a Beatrice stockholder.

8 Petitioner did not assert any independent basis for his standing to raise any claims in the Delaware courts beyond his standing under Delaware Corporation Law. In any event, nothing suggests that petitioner would have had standing under the federal statutes to which he refers or under Rule 23.1 of the Federal Rules of Civil Procedure. *See* Securities and Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (1982); Investment Company Act of 1940, 15 U.S.C. § 80a-1, *et seq.* (1982); Fed. R. Civ. P. 23.1.

Illinois, 177 U.S. 442, 447 (1900), this Court will defer to the rules of the particular state unless it appears that the state's rules exist to deprive litigants any reasonable opportunity to present federal issues. *NAACP v. Alabama*, 377 U.S. 288, 296 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. at 493. In this case, no suggestion is made, or could be made, that the Delaware law rendering petitioner's federal claims improperly raised exists solely to defeat the assertion of valid federal claims in Delaware. As is demonstrated below, Delaware's standing rule serves a valid state purpose equally applicable to federal and state causes of action. *See* Point B, *infra*. Thus, the Delaware Supreme Court's decision that the petitioner had no standing to sue effectively barred petitioner's attempt to set up his federal claims below.[9]

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9 Petitioner apparently also argues that the Delaware Supreme Court was compelled to address his federal claims without regard to his lack of standing. This position is meritless. *See, e.g., John v. Paullin*, 231 U.S. 583, 585 (1913) ("without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts . . . and the rules of practice to be applied in its exercise; and the state law and practice in this regard are not less applicable when federal rights are in controversy"); *see also United States v. Burnison*, 339 U.S. 87, 94-95 (1950); *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698, 704 (1942); *In re Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912).

Finally, although petitioner is less than clear on this point, he also apparently contends that if Section 327 of the Delaware Corporation Law does deprive him of standing to pursue purchased claims, that statute violates the supremacy clause, U.S. Const. art. VI, § 2. (Petition at 30) The petition thus raises an issue which has never been raised before in this litigation. This Court has long refused to issue a writ of certiorari to consider federal claims that are first raised in the petition for certiorari, having no jurisdiction to do so under 28 U.S.C. § 1257(3). *See Webb v. Webb*, 451 U.S. 493, 498-99 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Ellis v. Dixon*, 349 U.S. 458, 463 (1955). The argument that petitioner now advances was never raised in

(*Footnote continued on next page*)

Clearly, petitioner did not properly "set up" a federal claim and thus cannot invoke 28 U.S.C. § 1257(3) as a basis for this Court's jurisdiction.[10]

(*Footnote continued from previous page*)

the Delaware Supreme Court and thus cannot be the basis for issuance of a writ of certiorari. Petitioner's supremacy clause argument is in any event frivolous. Petitioner does not claim, as he must to establish preemption, either that a provision of federal law expressly preempts the challenged Delaware statutory provision or that the state law is preempted by implication due to an unavoidable conflict with a specific federal law. *See Louisiana Public Service Association v. FCC*, 476 U.S. 355 (1986); *Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 480 (1984).

10 Even if petitioner had properly set up a federal claim below and jurisdiction to grant certiorari existed, issuance of the writ is clearly not warranted in this case. Issuance of a writ of certiorari rests in this Court's sound discretion, and a petition is granted only when there are "special and important reasons therefor." Sup. Ct. R. 17; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74-75 (1955). Supreme Court Rule 17 sets forth as illustrative of the character of cases which this Court deems "special and important" state court decisions *deciding* important questions of federal law. As petitioner admits, the Delaware Supreme Court did not decide any question of federal law.

Further, the federal questions asserted by petitioner are absolutely devoid of merit. This lack of substantiality provides an independent ground for dismissal of the petition. *See Palmer Oil Corp. v. Amerada Petroleum*, 343 U.S. 390, 391 (1952); *Zucht v. King*, 260 U.S. 174, 176 (1922). Petitioner's contentions that BCI and KKR violated Section 7 of the Securities and Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78g, and Regulations G and U promulgated thereunder, must fail because the transaction at issue is not subject to Section 7 of the 1934 Act. Section 7 was enacted in order to "prevent[ ] the excessive use of credit for the purchase or carrying of securities." 15 U.S.C. § 78g(a). In a merger transaction such as the merger between BCI and Beatrice, the securities of the acquired entity do not constitute margin stock within the meaning of Regulations G and U, because immediately upon the merger, the acquired stock is delisted and no longer publicly held or traded. *See* 12 C.F.R. §§ 207.2(i), 221.2(h) (1987). Moreover, Regulations G and U do not apply to credit extended to

(*Footnote continued on next page*)

B. The Delaware Supreme Court's Judgment Rests Upon An Independent and Adequate State Ground and this Court Therefore Has No Jurisdiction to Review that Judgment

This Court has historically held that it lacks jurisdiction to grant a writ of certiorari when the state court judgment to be reviewed rests on an independent and adequate state ground. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-11 (1935) ("our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment"); *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision"). This limitation on this Court's jurisdiction is based on the fundamental division of power between the state and

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(*Footnote continued from previous page*)

purchase securities when there is a pre-existing merger agreement between the securities issuer and the purchaser. 12 C.F.R. § 207.112 (1987).

Petitioner's claim that KKR and BCI violated Section 7(a) of the Investment Company Act of 1940 (the "ICA"), 15 U.S.C § 80a-7(a), is similarly without merit because neither entity was an investment company as defined in the statute. Section 3(a) of the ICA defines an investment company as one which issues securities *and* which is engaged (1) primarily in the business of investing, reinvesting, or trading in securities; or (2) in issuing face-amount securities of the installment type; or (3) in investing, reinvesting, owning or trading in securities having a value exceeding 40 per centum of the value of such issuer's total assets. 15 U.S.C. § 80a-3(a). BCI is in the business of owning businesses. Petitioner did not claim and cannot show that BCI is engaged in the business of investing, reinvesting, or trading in securities, Section 3(a)(1), or of issuing face-amount installment certificates, Section 3(a)(2). BCI also does not meet the test of Section 3(a)(3) because the Beatrice securities are not investment securities under the ICA. Likewise, KKR is not an investment company because it is neither an issuer nor an entity engaged in the activities enumerated in Section 3(a).

federal judicial systems. This Court is not empowered to review matters of purely state law. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

The Delaware Supreme Court's judgment was certainly supported by an independent state ground—petitioner's lack of standing to object to the settlement of a derivative state court action. While the Delaware Supreme Court noted that "[o]n appeal, [petitioner] raises numerous arguments, many of which were not raised below, based upon provisions of the federal securities laws" (A. 58a-59a), the court did not reach those arguments. There was no federal ground for the decision. Based exclusively upon an analysis of Delaware law, the Delaware Supreme Court concluded that petitioner "clearly lacks standing to challenge derivatively the merger . . . Therefore, his claims must be dismissed." (A. 60a-61a)

This Court has traditionally found that the independent state law basis of a state court judgment is adequate when the state law is evenly applied and reasonable in purpose. *See, e.g., Wolfe v. North Carolina*, 364 U.S. 177, 194-96 (1960); *Enterprise Irrigation District v. Farmer's Mutual Canal Co.*, 243 U.S. 157, 164-65 (1917); R. Stern, E. Gressman & M. Shapiro, *Supreme Court Practice*, § 3.28 at 179-83. In this case, the adequacy of the independent state ground underlying the Delaware Supreme Court judgment is unquestionable; the Delaware Supreme Court properly applied long-standing Delaware corporation law that is eminently reasonable.

A state stockholder derivative action is a creature of state corporation law, and this Court has repeatedly held that this is an area which Congress clearly and specifically left to state regulation. *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979); *Sante Fe Industries, Inc. v. Green*, 430 U.S. 462, 478 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Smith v. Sperling*, 354 U.S. 91, 95 (1957). It is generally accepted that state law governs the determination of whether a stockholder may sue in a derivative capacity in a state stockholder derivative action. *Swanson v. Traer*, 354 U.S. 114, 116 (1957); *cf. Cramp v. Board of Public*

Instruction, 368 U.S. 278, 281-82 (1961) (state standing law bar to constitutional claim will not be reviewed by the Supreme Court).

By Delaware statute, a party cannot maintain a derivative action challenging a corporate transaction unless that party was a stockholder at the time of the transaction complained of or had its stock devolve upon it by operation of law. Del. Code Ann. tit. 8, § 327 (1983).[11] Delaware courts have consistently applied this well-settled principle to bar improper derivative challenges. *See, e.g., Schreiber v. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978); *Maclary v. Pleasant Hills, Inc.*, 109 A.2d 830, 833 (Del. Ch. 1954); *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d 121, 123-24 (Del. Ch. 1950). In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged derivatively. *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d at 123-24.

Petitioner simply did not meet the standing requirements of the Delaware law. Petitioner did not become a Beatrice stockholder until after KKR's proposal had been announced, the Initial Merger Agreement had been signed, plaintiffs had commenced numerous actions, conducted extensive discovery and secured substantial benefits in the Memorandum of Understanding, the Revised Merger Agreement had been signed, a settlement in principle had been reached by the parties, the record date for voting on the merger proposal had passed, the stipulation of settlement had been executed, the Chancery Court had certified the class for settlement purposes and had set the hearing date, and the proxy statement had been dissemi-

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11 Petitioner first addressed the standing issue by alleging before the Delaware Supreme Court that he had standing pursuant to Del. Code Ann. tit. 8, § 261 (1983). Section 261 merely preserves claims by or against a merged corporation; it does not confer standing on petitioner and was irrelevant. *See Lewis v. Anderson*, 453 A.2d 474, 479-80 (Del. Ch. 1982), *aff'd*, 477 A.2d 1040 (Del. 1984).

nated.[12] The Delaware Supreme Court found that petitioner, by his own admission, acquired Beatrice stock only after he reviewed the March 11, 1986 proxy statement which set forth the terms of the proposed merger and settlement. (A. 59a) The Delaware Supreme Court thus correctly applied Delaware law to dismiss petitioner's claims.

Moreover, the Delaware standing law applied by the court below is reasonable and is not designed to hinder presentation of federal issues in the state court. *See Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930); *Nickel v. Cole*, 256 U.S. 222, 225 (1921). The salutary purpose of this statute is to discourage would-be plaintiffs from purchasing stock in order to maintain a derivative action attacking a transaction which occurred prior to their purchase. *Schreiber v. Bryan*, 396 A.2d at 516; *Maclary v. Pleasant Hills, Inc.*, 109 A.2d at 833; *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d at 123. The Delaware Supreme Court expressly recognized this purpose in holding that petitioner was without standing to challenge the merger. (A. 60a)

In fact, the Delaware standing statute represents the accepted approach to regulating shareholder derivative actions. *See, e.g.*, N.Y. Bus. Corp. Law § 626(b) (McKinney 1986); Model Business Corp. Act § 49 (1971); *see also* H. Henn & J. Anderson, *The Law of Corporations*, § 62 at 1058-59 (1983). Rule 23.1 of the Federal Rules of Civil Procedure imposes an

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12 Petitioner appears to have a practice of purchasing stock in a corporation after challenged events have transpired for the purpose of contesting the settlement of claims arising out of those events. *See, e.g., Leighton v. One William Street Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965); *Kerner v. Crossman*, 211 F. Supp. 397, 401 (S.D.N.Y. 1962). One court described him as "an habitual *pro se* litigant whose claims [are] often conclusory and lacking in legal merit." *Leighton v. Paramount Pictures Corp.*, 340 F.2d 859, 861 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965). Here, his conduct has prevented—for a year and a half—the disbursement of the court-approved settlement fund to the former Beatrice stockholders.

identical requirement on shareholders suing in a derivative capacity in federal court.[13]

Petitioner cannot obtain review in this Court of the Delaware Supreme Court's rejection of his objections to the settlement because that decision rests upon the independent and adequate state ground that petitioner lacked standing to challenge the merger derivatively.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 18, 1987

Respectfully submitted,

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13 Rule 23.1 of the Federal Rules of Civil Procedure requires shareholders asserting a derivative action in federal courts to plead (1) that they were shareholders in the corporation at the time of the transaction complained of, and (2) that they are shareholders at the time the action is commenced. The purpose of this provision is to prevent the federal court from being used to litigate purchased grievances or from becoming a party to speculative suits against corporations. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 566-69 (1949). Rule 23.1 has been interpreted by the federal courts in the merger context in the same manner that Section 327 of the Delaware Corporation Law has been interpreted by the Delaware courts in that context. *Compare Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 693 (2d Cir. 1980), *with Newkirk v. W.J. Rainey, Inc.*, 76 A.2d at 123-24.

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APPENDICES

Appendix A

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Statutory Provisions

Securities and Exchange Act of 1934

15 U.S.C. § 78g (1982)

(a) For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall, prior to October 1, 1934, and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security). For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of—

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but not more than 75 per centum of the current market price.

Such rules and regulations may make appropriate provision with respect to the carrying of undermargined accounts for limited periods and under specified conditions; the withdrawal of funds or securities; the substitution or additional purchases of securities; the transfer of accounts from one lender to another; special or different margin requirements for delayed deliveries, short sales, arbitrage transactions, and securities to which paragraph (2) of this subsection does not apply; the bases and the methods to be used in calculating loans, and margins and market prices; and similar administrative adjustments and details.

For the purposes of paragraph (2) of this subsection, until July 1, 1936, the lowest price at which a security has sold on or after July 1, 1933, shall be considered as the lowest price at which such security has sold during the preceding thirty-six calendar months.

(b) Notwithstanding the provisions of subsection (a) of this section, the Board of Governors of the Federal Reserve System, may, from time to time, with respect to all or specified securities or transactions, or classes of securities, or classes of transactions, by such rules and regulations (1) prescribe such lower margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate for the accommodation of commerce and industry, having due regard to the general credit situation of the country, and (2) prescribe such higher margin requirements for the initial extension or maintenance of credit as it may deem necessary or appropriate to prevent the excessive use of credit to finance transactions in securities.

(c) It shall be unlawful for any member of any national securities exchange or any broker or dealer, directly or indirectly, to extend or maintain credit or to arrange for the extension or maintenance of credit to or for any customer—

(1) on any security (other than an exempted security), in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System shall prescribe under subsections (a) and (b) of this section;

(2) without collateral or on any collateral other than securities, except in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe (A) to permit under specified conditions and for a limited period any such member, broker, or dealer to maintain a credit initially extended in conformity with the rules and regulations of the Board of Governors of the

Federal Reserve System, and (B) to permit the extension or maintenance of credit in cases where the extension or maintenance of credit is not for the purpose of purchasing or carrying securities or of evading or circumventing the provisions of paragraph (1) of this subsection.

(d) It shall be unlawful for any person not subject to subsection (c) of this section to extend or maintain credit or to arrange for the extension or maintenance of credit for the purpose of purchasing or carrying any security, in contravention of such rules and regulations as the Board of Governors of the Federal Reserve System shall prescribe to prevent the excessive use of credit for the purchasing or carrying of or trading in securities in circumvention of the other provisions of this section. Such rules and regulations may impose upon all loans made for the purpose of purchasing or carrying securities limitations similar to those imposed upon members, brokers, or dealers by subsection (c) of this section and the rules and regulations thereunder. This subsection and the rules and regulations thereunder shall not apply (A) to a loan made by a person not in in the ordinary course of his business, (B) to a loan on an exempted security, (C) to a loan to a dealer to aid in the financing of the distribution of securities to customers not through the medium of a national securities exchange, (D) to a loan by a bank on a security other than an equity security, or (E) to such other loans as the Board of Governors of the Federal Reserve System shall, by such rules and regulations as it may deem necessary or appropriate in the public interest or for the protection of investors, exempt, either unconditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection and the rules and regulations thereunder.

(e) The provisions of this section or the rules and regulations thereunder shall not apply on or before July 1, 1937, to any loan or extension of credit made prior to

June 6, 1934, or to the maintenance, renewal, or extension of any such loan or credit, except to the extent that the Board of Governors of the Federal Reserve System may by rules and regulations prescribe as necessary to prevent the circumvention of the provisions of this section or the rules and regulations thereunder by means of withdrawals of funds or securities, substitutions of securities, or additional purchases or by any other device.

(f) (1) It is unlawful for any United States person, or any foreign person controlled by a United States person or acting on behalf of or in conjunction with such person, to obtain, receive, or enjoy the beneficial use of a loan or other extension of credit from any lender (without regard to whether the lender's office or place of business is in a State or the transaction occurred in whole or in part within a State) for the purpose of (A) purchasing or carrying United States securities, or (B) purchasing or carrying within the United States of any other securities, if, under this section or rules and regulations prescribed thereunder, the loan or other credit transaction is prohibited or would be prohibited if it had been made or the transaction had otherwise occurred in a lender's office or other place of business in a State.

(2) For the purposes of this subsection—

(A) The term "United States person" includes a person which is organized or exists under the laws of any State or, in the case of a natural person, a citizen or resident of the United States; a domestic estate; or a trust in which one or more of the foregoing persons has a cumulative direct or indirect beneficial interest in excess of 50 per centum of the value of the trust.

(B) The term "United States security" means a security (other than an exempted security) issued by a person incorporated under the laws of any State, or whose principal place of business is within a State.

(C) The term "foreign person controlled by a United States person" includes any noncorporate entity in which United States persons directly or indirectly have more than a 50 per centum beneficial interest, and any corporation in which one or more United States persons, directly or indirectly, own stock possessing more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock.

(3) The Board of Governors of the Federal Reserve System may, in its discretion and with due regard for the purposes of this section, by rule or regulation exempt any class of United States persons or foreign persons controlled by a United States person from the application of this subsection.

Investment Company Act of 1940

15 U.S.C. § 80a-3(a) (1982):

When used in this subchapter, "investment company" means any issuer which—

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

15 U.S.C. § 80a-7(a) (1982):

No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 80a-8 of this title, shall directly or indirectly—

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;

(3) control any investment company which does any of the acts enumerated in paragraphs (1) and (2) of this subsection;

(4) engage in any business in interstate commerce; or

(5) control any company which is engaged in any business in interstate commerce.

The provisions of this subsection shall not apply to transactions of an investment company which are merely incidental to its dissolution.

28 U.S.C. § 1257(3) (1982):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Delaware Corporation Law

Del. Code Ann. tit. 8, § 327 (1983):

In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law.

Regulatory Provisions

Federal Reserve Board Regulations

12 C.F.R. § 207.2(i) (1987):

(i) "Margin stock" means:

(1) Any equity security registered or having unlisted trading privileges on a national securities exchange;

(2) Any OTC margin stock;

(3) Any OTC security designated as qualified for trading in the National Market System under a designation plan approved by the Securities and Exchange Commission (NMS Security);

(4) Any debt security convertible into a margin stock or carrying a warrant or right to subscribe to or purchase a margin stock;

(5) Any warrant or right to subscribe to or purchase a margin stock; or

(6) Any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), other than:

(i) A company licensed under the Small Business Investment Company Act of 1958, as amended (I5 U.S.C. 661); or

(ii) A company which has at least 95 percent of its assets continuously invested in exempted securities (as defined in 15 U.S.C. 78c(a)(12)); or

(iii) A company which issues face-amount certificates as defined in 15 U.S.C. 80a-2(a)(15), but only with respect of such securities.

12 C.F.R. § 207.112 (1987):

(a) Petitions have been filed with the Board raising questions as to whether the margin requirements in Regulation G apply to two types of corporate acquisitions in which debt securities are issued to finance the acquisition of margin stock of a target company.

(b) In the first situation, the acquiring company, Company A, controls a shell corporation that would make a tender offer for the stock of Company B, which is margin stock (as defined in § 207.2(i)). The shell corporation has virtually no operations, has no significant business function other than to acquire and hold the stock of Company B, and has substantially no assets other than the margin stock to be acquired. To finance the tender offer, the shell

corporation would issue debt securities which, by their terms, would be unsecured. If the tender offer is successful, the shell corporation would seek to merge with Company B. However, the tender offer seeks to acquire fewer shares of Company B than is necessary under state law to effect a "short form" merger with Company B, which could be consummated without the approval of shareholders or the board of directors of Company B.

(c) The purchase of the debt securities issued by the shell corporation to finance the acquisition clearly involves "purpose credit" (as defined in § 207.2(l)). In addition, such debt securities would be purchased only by sophisticated investors in very large minimum denominations, so that the purchasers may be "lenders" for purposes of Regulation G. See 12 CFR 207.2(h). Since the debt securities contain no direct security agreement involving the margin stock, applicability of the lending restrictions of the Regulation turns on whether the arrangement constitutes an extension of credit that is secured indirectly by margin stock.

(d) As the Board has recognized, "indirect security" can encompass a wide variety of arrangements between lenders and borrowers with respect to margin stock collateral that serve to protect the lenders' interest in assuring that a credit is repaid where the lenders do not have a conventional direct security interest in the collateral. See 12 CFR 211.113. However, credit is not indirectly secured by margin stock if the lender in good faith has not relied on the margin stock as collateral extending or maintaining credit. See 12 CFR 207.2(f)(2)(iv).

(e) The Board is of the view that, in the situation described in paragraph (b) of this section, the debt securities would be presumed to be indirectly secured by the margin stock to be acquired by the shell acquisition

vehicle. The staff has previously expressed the view that nominally unsecured credit extended to an investment company, a substantial portion of whose assets consist of margin stock, is indirectly secured by the margin stock. See Federal Reserve Regulatory Service ¶ 5-917.12. This opinion notes that the investment company has substantially no assets other than margin stock to support indebtedness and thus credit could not be extended to such a company in good faith without reliance on the margin stock as collateral.

(f) The Board believes that this rationale applies to the debt securities issued by the shell corporation described above. At the time the debt securities are issued, the shell corporation has substantially no assets to support the credit other than the margin stock that it has acquired or intends to acquire and has no significant business function other than to hold the stock of the target company in order to facilitate the acquisition. Moreover, it is possible that the shell may hold the margin stock for a significant and indefinite period of time, if defensive measures by the target prevent consummation of the acquisition. Because of the difficulty in predicting the outcome of a contested takeover at the time that credit is committed to the shell corporation, the Board believes that the purchasers of the debt securities could not, in good faith, lend without reliance on the margin stock as collateral. The presumption that the debt securities are indirectly secured by margin stock would not apply if there is specific evidence that lenders could in good faith rely on assets other than margin stock as collateral, such as a guaranty of the debt securities by the shell corporation's parent company or another company that has substantial non-margin stock assets or cash flow. This presumption would also not apply if there is a merger agreement between the acquiring and target companies entered into at the time the commitment is made to purchase the debt securities or in any event before loan funds are advanced. In addition, the presumption would not apply if the obligation of the

purchasers of the debt securities to advance funds to the shell corporation is contingent on the shell's acquisition of the minimum number of shares necessary under applicable state law to effect a merger between the acquiring and target companies without the approval of either the shareholders or directors of the target company. In these two situations where the merger will take place promptly, the Board believes the lenders could reasonably be presumed to be relying on the assets of the target for repayment.

(g) In addition, the Board is of the view that the debt securities described in paragraph (b) of this section are indirectly secured by margin stock because there is a practical restriction on the ability of the shell corporation to dispose of the margin stock of the target company. "Indirectly secured" is defined in § 207.2(f) of the regulation to include any arrangement under which the customer's right or ability to sell, pledge, or otherwise dispose of margin stock owned by the customer is in any way restricted while the credit remains outstanding. The purchasers of the debt securities issued by a shell corporation to finance a takeover attempt clearly understand that the shell corporation intends to acquire the margin stock of the target company in order to effect the acquisition of that company. This understanding represents a practical restriction on the ability of the shell corporation to dispose of the target's margin stock and to acquire other assets with the proceeds of the credit.

(h) In the second situation, Company C, an operating company with substantial assets or cash flow, seeks to acquire Company D, which is significantly larger than Company C. Company C establishes a shell corporation that together with Company C makes a tender offer for the shares of Company D, which is margin stock. To finance the tender offer, the shell corporation would obtain a bank loan that complies with the margin lending restrictions of Regulation U and Company C would issue

debt securities that would not be directly secured by any margin stock. The Board is of the opinion that these debt securities should not be presumed to be indirectly secured by the margin stock of Company D, since, as an operating business, Company C has substantial assets or cash flow without regard to the margin stock of Company D. Any presumption would not be appropriate because the purchasers of the debt securities may be relying on assets other than margin stock of Company D for repayment of the credit.

12 C.F.R. § 221.2(h) (1987):

(h) "Margin stock" means: (1) Any equity security registered or having unlisted trading privileges on a national securities exchange;

(2) any OTC margin stock;

(3) any OTC security designated as qualified for trading in the National Market System under a designation plan approved by the Securities and Exchange Commission (NMS security);

(4) any debt security convertible into a margin stock or carrying a warrant or right to subscribe to or purchase a margin stock;

(5) any warrant or right to subscribe to or purchase a margin stock; or

(6) any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), other than:

(i) A company licensed under the Small Business Investment Company Act of 1958, as amended (15 U.S.C. 661); or

(ii) a company which has at least 95 percent of its assets continuously invested in exempted securities (as defined in 15 U.S.C. 78c(a)(12)); or

(iii) a company which issues face-amount certificates as defined in 15 U.S.C. 80a-2(a)(15), but only with respect of such securities.

Constitutional Provision

U.S. Const. art. VI, § 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rules

Sup. Ct. R. 17:

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Fed. Rule Civ. P. 23.1:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that the plaintiff's share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal

or compromise shall be given to shareholders or members in such manner as the court directs.

Del. Sup. Ct. R. 8:

Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

Appendix B

SUPREME COURT RULE 28.1 STATEMENT

Respondent Beatrice Companies, Inc. is wholly owned by non-party Beatrice Company, formerly known as BCI Holdings Corporation.

Two non-party limited partnerships, KKR Associates and BCI Partners, L.P., through five intermediate partnerships of which one or the other of them is the general partner, control substantially all of the voting securities of Beatrice Company. In only two of those five intermediate partnerships, BCI Securities, L.P. and BCI Equity Associates, L.P., were any limited partnership interests publicly registered.

Neither Beatrice Companies, Inc. nor Beatrice Company has any subsidiary the stock of which is publicly traded.

Respondent Kohlberg Kravis Roberts & Co. is a general partnership, the general partners of which are Henry R. Kravis, George R. Roberts, Robert I. MacDonnell, Paul E. Raether and Michael W. Michaelson. These individuals are also the general partners of KKR Associates and certain of these individuals are also the general partners of BCI Partners, L.P. Such individuals and/or entities could also be deemed to be affiliates of certain other companies unrelated to Beatrice Companies, Inc. or Beatrice Company, the equity securities of most of which are not publicly traded. Such of those companies the equity securities of which are publicly traded are L.B. Foster Company, Fred Meyer, Inc., Pace Industries, Inc., Motel 6, Inc. and SCI Holdings, Inc.

Respondents United Operating Company, The Martha & Regina Brand Foundation, Inc. and SCB Co. are privately held corporations.